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No. 1050

# IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1962

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882.

Appellants,

v.

PAUL JONES, CHAIRMAN OF THE NAVAHO TRIBAL COUNCIL OF THE NAVAHO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAHO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAHO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

## JURISDICTIONAL STATEMENT

JOHN S. BOYDEN
ALLEN H. TIBBALS
BRYANT H. CROFT
*Counsel of Record*
604 El Paso Natural Gas Building
315 East 2nd South Street
Salt Lake City, Utah

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

## JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the District of Arizona, entered on September 28, 1962 and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINION BELOW

The opinion of the District Court for the District of Arizona is reported in 210 F. Supp. 125 (1962). Copies of the opinion, appendix to the opinion, finding of fact, conclusions of law and judgment are filed in this court with the Appeal of Paul Jones, Defendant herein. An earlier opinion of the court in this case is reported in 174 F. Supp. 211 (1959).

## JURISDICTION

This suit was brought under the Act of July 22, 1958, 72 Stat. 403, to quiet title to Indian lands comprising the Executive Order Reservation of December 16, 1882. The judgment of the District Court was entered on September 28, 1962, and notice of appeal was filed in that court on November 27, 1962. Orders enlarging the time to docket the case and file the record thereof with the clerk of this court to and including March 27, 1963, and to and including April 26, 1963, were entered by the District Court on January 16, 1963, and March 20, 1963 respectively. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by the Act of July 22, 1958, 72 Stat. 403. The following decisions sustain the power of Congress to define and prescribe the appellate jurisdiction of the Supreme Court:

> *American Construction Company* v. *Jacksonville, Tampa and Key West Railway Company*, 13 S. Ct. 758, 148 U.S. 372, 37 L.Ed. 486; *Stephan* v. *United States*, 63 S. Ct. 1135, 319 U.S. 423, 87 L.Ed. 1490.

## STATUTES INVOLVED

The Act of July 22, 1958, 72 Stat. 403, The Act of March 3, 1927, 44 Stat. 1347, 25 USC § 398 (d), the Act of May 25, 1918, 40 Stat. 570, 25 USC § 211 and the Executive Order of December 16, 1882 are set forth in Appendix "A" hereto.

## QUESTIONS PRESENTED

1. Whether the Secretary of the Interior had authority to settle the Navaho Indians as a Tribe upon the Hopi Executive Order Reservation after enactment of the Act of May 25, 1918, 40 Stat. 570, 25 USC § 211, or the Act of March 3, 1927, 44 Stat. 1347, 25 USC § 398(d).

2. Whether the Navaho Indian Tribe or individual Navaho Indians may share in the benefits of both the Navaho Indian Reservation and the Hopi Executive Order Reservation.

## STATEMENT

Perhaps as far back as 600 A.D. the ancestors of the Hopi Indians occupied the area between Navaho Mountain and the little Colorado River, and between the San Francisco Mountains in Arizona and the Luckachukas.[1] From all historic evidence it appears that the Navaho Indians entered what is now Arizona in the last half of the Eighteenth Century.[2]

The lands involved in this controversy were embraced within the Executive Order Reservation of December 16, 1882[3] for the purposes, among others, of reserving for the Hopi sufficient living space as

(1) Appendix to decision of U.S. Dist. Court, pg. 109
(2) Appendix to decision of U.S. Dist. Court, pg. 111
(3) Appendix "A" to this statement

against advancing Mormon settlers and Navaho Indians, of minimizing Navaho depredations against the Hopi, and of making a reservation area in which Indians other than Hopi could, in the future, in the discretion of any Secretary of the Interior, be given rights of use and occupancy.[4] The lands were withdrawn from settlement and sale, and were set apart "for the use and occupancy of the Moqui,[5] and such other Indians as the Secretary of the Interior may see fit to settle thereon."[6]

On May 25, 1918, 40 Stat. 570, 25 U.S.C. § 211, was enacted, prohibiting the creation of any Indian reservation or the making of any additions to existing reservations in the States of New Mexico and Arizona, except by Act of Congress.[7]

By the Act of March 3, 1927, 44 Stat. 1347, 25 USC § 398(d), changes in the boundaries of reservations created by Executive Order, proclamation, or otherwise for the use and occupation of Indians were prohibited, except by Act of Congress.[8]

Prior to February 7, 1931, except for the implied settlement of three hundred unidentified Navahos during 1909-1911, and which created no rights cognizable in this suit,[9] neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved

(4) Finding of Fact 16, U.S. Dist. Court, pg. 212
(5) The "Hopi" and "Moqui" are one and the same Indian people. Decision of U.S. Dist. Court Foot Note 1, pg. 2
(6) Appendix "A" to this statement
(7) Finding of Fact 28, U.S. Dist. Court, pg. 215 and Appendix "A" to this statement.
(8) Appendix "A" to this statement
(9) Conclusion of Law 5, U.S. Dist. Court, pg. 222

under the Executive Order, either expressly or by implication, authorized the Navaho Indian Tribe or any Navaho, whether or not then living in the reservation area, to use and occupy any part of the 1882 reservation for residential purposes.[10]

The Hopi Indian Tribe has long contended that it has the exclusive beneficial interest in all of the 1882 reservation for the common use and benefit of the Hopi Indians, trust title being conceded to be in the United States. The Navaho Indian Tribe contends that, subject to the trust title of the United States, it has the exclusive interest in approximately four-fifths of the 1882 reservation for the common use and benefit of the Navaho Indians, and concedes that the Hopi Indian Tribe has the exclusive interest in the remainder.[11]

Over a period of many years efforts have been made to resolve the controversy by means of agreement, administrative action, or legislation, all without success. The two tribes and officials of the Department of the Interior finally concluded that resort must be had to the courts. This lead to the enactment of the Act of July 22, 1958, 72 Stat. 403,[12] which declared the Executive Order Reservation to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as theretofore had been settled thereon by the Secretary of the Interior pursuant to such Executive Order.

The plaintiff, as Chairman of the Hopi Tribal

(10) Finding of Fact 35, U.S. Dist. Court, pg. 216
(11) Opinion of the U.S. Dist. Court, pg. 2
(12) Opinion of U.S. Dist. Court, pg. 2

Council, and in a representative capacity, as provided in said Act of July 22, 1958, commenced this action in the United States District Court for the District of Arizona against the Chairman of the Navaho Tribal Council, also in a representative capacity, as provided in said Act, and against the Attorney General of the United States, on behalf of the United States, to determine the rights and interests of said parties in the lands described in the Executive Order dated December 16, 1882, and to quiet title to said lands in the tribes or Indians establishing claims pursuant to said Executive Order and said Act of July 22, 1958.[13] The Chairman of each tribe was authorized by said Act to represent his tribe including all villages and clans thereof and any and all Hopi and Navaho Indians respectively.[14] Although the defendant, as Chairman of the Navaho Tribe, appeared in the action for "the Navaho Indian Tribe and for each and every member thereof and for each and every Navaho Indian, using and occupying or who has or has had any claim of any right, title or interest in the use and occupancy of any part, parcel or portion of the lands described in said Executive Order, dated December 16, 1882", he made no claim on behalf of individual Navaho In-

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(13) Plaintiff's complaint

(14) Act of July 22, 1958, 72 Stat. 403 (Appendix "A" hereto)

dians, except as such individuals may be beneficiaries under the Navaho Tribal Claim.[15]

The trial court concluded that beginning on February 7, 1931, and continuing to July 22, 1958, all Navaho Indians who entered that part of the 1882 reservation lying outside of Land Management District 6, as defined on April 24, 1943, for purposes of permanent residence, were impliedly settled therein by the Secretary of the Interior or his authorized representative at or shortly after the time of entry, and on July 22, 1958, all Navaho Indians then residing in the indicated part of the 1882 reservation were accordingly settled therein pursuant to the Executive Order of December 16, 1882.[16]

The trial court further concluded that beginning on June 2, 1937, the Navaho Indian Tribe, for the common use and benefit of the Navaho Indians, was impliedly settled in that part of the 1882 reservation lying outside of Land Management District 6, as defined on April 24, 1943, pursuant to the valid exercise of the authority conferred in the Secretary by the Executive Order of December 16, 1882.[17]

The trial court also concluded that the Hopi Indian Tribe and the Navaho Indian Tribe, for the common use and benefit of their respective members, but

(15) Transcript of Phoenix hearing March 16, 1959, Pg. 77, line 23 to and including line 2, Pg. 78.
Transcript of Pre-trial conference at San Francisco August 20, 1959, Pg. 51, lines 6-23; Pg. 65, lines 3-5; Pg. 76, line 18 to line 6 on Pg. 78.
Transcript of trial at Prescott October 20, 1960, Vol. XIX, Pg. 2290, lines 14 through 25; Pg. 2292, lines 9 through 12.

(16) Conclusion of Law 7, U.S. Dist. Court, pg. 223

(17) Conclusion of Law 8, U.S. Dist. Court, pg. 223

subject to the trust title of the United States, have joint, undivided, and equal interests both as to the surface and subsurface, including all resources, in and to that part of the reservation lying outside of Land Management District 6.[18]

The Navaho Indians living on the Executive Order Reservation of 1882, outside of said district 6, received the benefits of the Navaho Tribe and in the Navaho Indian Reservation[19] and all shared in the same benefits whether they lived inside or outside of the 1882 Executive Order Reservation.[20]

## THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of general importance because the judgment of the District Court traverses two fundamental concepts of Indian law; namely:

1. After the acts of May 25, 1918[21] and March 3, 1927[22] Congress alone had the power to create a new Indian reservation in the States of New Mexico or Arizona, and to change the boundaries of any Indian reservation in the United States.

2. Neither Indians nor Indian Tribes may share in the benefits of two reservations.

1. Assuming the conclusion of the lower court that the Secretary, by implication, settled the Navaho Tribe on a part of the Hopi Reservation,[23] it would

(18) Conclusion of Law 14, U.S.Dist. Court, Pg. 224
(19) Transcript of Proceedings, Vol. IX, Pg. 886
(20) Transcript of Proceedings, Vol. IX, Pg. 887
(21) 40 Stat. 570, 25 USC § 211
(22) 44 Stat. 1347, 25 USC § 398d
(23) Conclusion of Law 8, U.S. Dist. Court, Pg. 223

have thereby created an addition to the Navaho Reservation in Arizona contrary to the express prohibition of the Congress of the United States on May 25, 1918, or it would have changed the boundaries of the existing Navaho Reservation as prohibited by the Act of March 3, 1927.

Thus the judgment of the trial court granting joint, undivided and equal rights and interests to the Hopi and Navaho Tribes in the Executive Order Reservation of December 16, 1882, lying outside of the boundaries of Land Management District 6,[24] recognized and affirmed an "implied" and illegal act of the Secretary of the Interior.

Historically the government grant of lands for the "use"[25] or "use and occupancy"[26] of an Indian Tribe constitutes the establishment of a reservation for that Tribe. Indeed the Moqui Executive Order of December 16, 1882, here in question, omitted the word "reservation" and used the phrase "for the use and occupancy".[27] Nevertheless, two Presidents of the United States in the Executive Orders of January 8,

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(24) Judgment, par. 3, U.S. Dist. Court, Pg. 228

(25) ie — Jicarilla Apache, Nov. 11, 1907, Kappler, Laws & Treaties, Vol. III, Part III, 681; Walapai, June 2, 1911, Kappler, Laws & Treaties, Vol. III, Part III, 672; Navaho Feb. 10, 1913, Kappler, Laws & Treaties, Vol. III, Part III, 673.

(26) ie — Suppai, June 3, 1880, Kappler, Laws & Treaties, Vol. I, Part III, 809; Suppai, Nov. 23, 1880, Kappler, Laws & Treaties, Vol. I, Part III, 809.

(27) Appendix "A" hereto, Executive Order Dec. 16, 1882, Kappler, Laws & Treaties, Vol. I, Part III, 805.

1900[28] and January 28, 1908[29] later referred to the land so withdrawn as the "Moqui Reservation".

Congress did not, by the above-mentioned acts, revoke the power of the Secretary, granted in the Executive Order, to settle "other Indians" upon the Hopi Executive Order Reservation. But it did prevent the granting of use and occupancy to the whole Navaho Tribe, consisting of over 80,000 members, most of whom had never lived within the boundaries of the 1882 Executive Order Reservation.

The District Court in its opinion outlined the evidence pertaining to Navaho depredations against, and pressure upon, the Hopi for the years prior to 1900, then further opined, "That this state of affairs continued for the thirty years which followed, prior to the official settlement of Navajos in the reservation, is equally well established in this record".[30] This pressure and trespass were not legalized by the implied tribal settlement. Such permitted use and occupancy of the Navaho Tribe cannot be distinguished from a reservation boundary change or an addition to the sixteen million acre Navaho Reservation which already completely surrounds the Hopi Reservation. The court's recognition of a joint Navaho interest with the Hopi in part of the Hopi reservation does not rob

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(28) Navaho, Executive Order Jan. 8, 1900, Kappler, Laws & Treaties, Vol. I, (Laws), Part III, 877.

(29) Navaho, Executive Order Jan. 28, 1908, Kappler, Laws Treaties, Vol. III (Laws), Part III, 670.

(30) Opinion of the U.S. Dist. Court, Pg. 92

this Navaho interest of its character as an addition to or change in the boundary of the Navaho reservation. Reservations have been established for joint occupation of two tribes.[31]

It is not in the public interest, and certainly not in the interest of Indians generally, to sancti lepartmental administrative action affecting substantial Indian rights when such action is contrary to express statutory prohibitions theretofore enacted by Congress.

2. Navaho Indians using and occupying the Hopi Reservation have shared in the benefits of the Navaho Tribe and Reservation equally with Navaho Indians residing on the Navaho Reservation.[19][20]

Granting rights in the Hopi Reservation to the Navaho Tribe, long firmly entrenched in its own reservation, gives Indian rights in two reservations to more than 80,000 Navaho Indians, most of whom do not now live, and never have lived, within the boundaries of the Hopi Reservation. Such is contrary to well established, administrative practice and principles pertaining to Indian law.

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(31) Executive Order Reservation, Jan. 10, 1879, Pima & Maricopa, Kappler, Laws & Treaties, Vol. I, Part III, Pg. 806;

Executive Order Reservation of May 8, 1911, Pima & Maricopa, Kappler, Laws & Treaties, Vol. III, Part III, Pg. 668;

Executive Order Reservation of Jan. 16, 1868, Cheyenne & Arapahoe, Kappler, Laws & Treaties, Vol. I, Part III, Pg. 833.

Administrative regulations have long prohibited any Indian from sharing in the benefits of two tribes.[32] Dual benefits to Indians have been administratively[33] and judicially[34] denied. A Departmental Solicitor expressly stated in an opinion that Navaho Indians, *for whom a separate reservation had been created,* could not share in the Colorado River Reservation which was created "for the Indians of the Colorado River and its tributaries."[35]

Many Indian reservations have been established with Secretarial authority reserved to settle other Indians upon such reservations. It is of general importance to all Indians and Indian tribes to know whether, under such a reservation of power, the Secretary of the Interior can give an Indian tribe rights in another reservation when a reservation for such tribe has already been established and is being used and occupied by such tribe.

It is submitted that the decision of the three-judge district court fails to recognize established principles of Indian law, and that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

JOHN S. BOYDEN
ALLEN H. TIBBALS
BRYANT H. CROFT
*Counsel of Record*

604 El Paso Natural Gas Building
315 East 2nd South Street
Salt Lake City, Utah

(32) 25 CFR 224.4
(33) Josephine Valley, et al. 19 L.D. 329; Niels Esperson (on Review) 21 L.D. 271 Hagstrom v. Martell 39 L.D. 508
(34) Mandler, et al. v. U.S., 52 F.2d 713 (CA-10)
(35) Memorandum Opinion, Margold, 11-24-36

## APPENDIX A

## ACT OF JULY 22, 1958

## 72 STAT. 403

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. The Navaho Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navaho or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28, United States Code, section 2284, and any party may appeal directly to the Su-

preme Court from the final determination by such three judge district court.

SEC. 2. Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. The Navaho and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

SEC. 3. Nothing in this Act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

## THE ACT OF MARCH 3, 1927

## 44 STAT. 1347

## 25 USC § 398(d)

Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made

except by Act of Congress: Provided, That this shall not apply to temporary withdrawals by the Secretary of the Interior.

THE ACT OF MAY 25, 1918
40 STAT. 570
25 USC § 211

No Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by the Act of Congress.

EXECUTIVE ORDER OF DECEMBER 16, 1882
KAPPLER, LAWS & TREATIES
VOL. I, PART III, 805

Executive Mansion,
December 16, 1882.

It is hereby ordered that the tract of country, in the territory of Arizona, lying and being within the following described boundaries, viz. beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36° 30′ north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35° 30′ north; thence due east to the one hundred and tenth degree of longitude west, thence due north to place of beginning, be and the same is hereby withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

Chester A. Arthur

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DEWEY HEALING, Chairman of the Hopi Council of the Hopi Indian Tribe, etc., *Appellant*,

v.

PAUL JONES, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, etc., and ROBERT F. KENNEDY, Attorney General of the United States, etc.

**Appeal from the United States District Court for the District of Arizona**

## MEMORANDUM FOR THE APPELLEE CHAIRMAN

This is the Hopis' cross-appeal from the judgment of the specially constituted three-judge court below (210 F. Supp. 125) in the litigation authorized by Congress in the Act of July 22, 1958, Pub. L. 85-547, 72 Stat. 403, for the final settlement of the long standing land controversy between the Navajo and the Hopi Tribes of Indians.

The facts and the issues are set forth in detail in the jurisdictional statement heretofore filed on behalf of the Navajos in *Jones* v. *Healing,* No. 985 of the present Term.

For the reasons set forth at pp. 22-23 of that document, we consider the Hopis' present contentions to be untenable. None the less, as we have already said, we urge that, with a view to ultimate reconciliation between the two quasi-sovereign Indian nations involved, the Hopis' claims be not rejected before their arguments have been fully heard by this Court.

Accordingly, we join in asking that this Court note probable jurisdiction of the present appeal by the Hopis, and we again urge that probable jurisdiction of the Navajos' appeal in No. 985 be likewise noted.

Respectfully submitted.

NORMAN M. LITTELL,
1824-26 Jefferson Place, N.W.,
Washington 6, D. C.,
*Counsel for the Appellee Chairman.*

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.,

JOSEPH F. MCPHERSON,
LaCanada, California,
*Of Counsel.*

MAY 1963.